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The FCC's Role in TV Programming Regulation

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THE FCC’S ROLE IN TV PROGRAMMING REGULATION*

I. Afternoon Panel Discussion

COX: I would like to cross-examine Ben a little. I won’t ask you to identify the clients, because that certainly would be unfair, but I would like to know a little more about the character of the situations in which they called you to say the fairness doctrine or Section 3151 or some policy of the Commission “just makes it too much work.” You mention one situation in which the licensee has perhaps been carrying a so called “right wing” syndicated program and he finds that the talent, the man who prepares this program, is a little given to real personal attacks upon individuals, so he calls you to find out what his responsibilities are and ends up by throwing up his hands. I am sure that you would agree with me that it is fundamental to our entire scheme of regulation that he, as a licensee, is responsible for whatever he broadcasts. Now this doesn’t mean we hang him everytime he makes a mistake; that’s unfair and unreasonable. But he is responsible, so that I take it you are not claiming that if — to pick a name out of the air — Dean Manion or Rev. MacIntyre personally attacks someone, this should be a matter of no concern to the licensee. It is his station. Ideally, in the best of all possible regulatory worlds you tried to outline, I suppose the theory would be that he would screen every one of those tapes, just as a television licensee would preview every episode of every television program that is going to come down the line to him, and he would know in advance, and, therefore, he would present some episodes of Dr. MacIntyre and not others, depending on what he thought.

Nobody ever challenges the licensee’s right to edit, as Eddie would say, or to censor, as others would say. Eddie is right — he is not a carrier. You can’t just come in and say, because you have a point of view in the abstract, that you are entitled to get on. You can’t even say you are entitled to get on if you have a view on an issue that has been discussed if your view, or something like it, has already been presented. So aside from this one special situation here, I think a responsible licensee might well conclude, whether he properly blames

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* The annual Symposium sponsored by the Villanova Law Review is traditionally presented in two parts. The afternoon session is in the nature of a workshop. The panelists present their papers and then discuss the positions adopted among themselves and with the members of the Law Review and distinguished invited guests. During the evening session, which is open to the public, the panelists restate their basic positions and explore the various issues in a general manner. The more salient portions of both panel discussions are reproduced.

it on the fairness doctrine or whether he has simply suddenly come to realize what has been going on, that this kind of situation bothers him.

I have a friend — a friend of yours, who shall be nameless — whose wife owns a radio station. He was once talking to me about its programming, and he indicated that he carried "The Twentieth Century Reformation Hour.” And I said “Well, I take it that means that you approve what Dr. MacIntyre is saying this week about the FCC.” He said, “Is he talking about the FCC?” and I said, “You mean to tell me that your wife is presenting programming over this station that you don’t know — that she doesn’t know anything about?” Well, unfortunately, I think sometimes that is true. But aside from that situation, what kind of factual situations bother your clients?

FISHER: I don’t want to be the only one on the hook here. I notice Eddie Barker very carefully refrained from commenting on this question of whether newsmen feel inhibited or not inhibited under the fairness doctrine, so I would like to speak to him too. Basically, I think the fallacy in your approach and the Commission’s approach on the fairness doctrine is the “one-to-one” controversy question. When it is a “one-to-one” situation, I attack someone or I take a position on the war in Vietnam. At that second there comes into play an immediate responsibility to let that other fellow reply or to get someone who has a different view on Vietnam. Every issue therefore, becomes a world unto itself. That, I think, is the basic difficulty. It wouldn’t bother me at all, and it certainly wouldn’t bother many of my clients to let the ministers go on, make the accusations that they make, on the theory that the answers to those accusations are being covered on other days, on other stations, on other media, or even occasionally by ourselves, in a rather haphazard manner. It is the requirement of immediate responsibility, the correlative responsibility that causes the hang-up and causes some broadcasters, to my personal knowledge, to simply say "It isn’t worth it.”

BARKER: We have had a lot of fun with the fairness doctrine. The problem as we see it, of having to work with this thing on a day-to-day basis, is what you are hitting at. Whatever view that we put on, and you take a community like ours with a couple of million people in the area, there is going to be somebody who will not agree with us. We have gotten to the point — we have just had to get very hard-nosed about this and occasionally, I think we had one instance in the last two years, someone has complained to the
Commission about this. It is a difficult thing to work with. It gets down to the point, I think, that somewhere along the line, as long as the FCC gives out these licenses or controls who it is that gets these licenses, you cannot put this thing on a day-to-day basis. Every day a situation comes up and we are going to have to say, "All right, the fairness doctrine is going to be invoked here. You have to do it." I think you have to look at it on a broader spectrum and if in the three-year period that you have this license, you do not do a good job, if you do not serve the public interest, then, I think is the time that you can get into this thing of fairness. Getting into the fairness doctrine on a daily basis — present a Madelyn Murray O'Hair who is now down in our part of the country —

COX: Good Luck!

BARKER: In fact she is on one of the radio stations regularly down there now. She's in Austin College, isn't she?

FISHER: That's right. Is atheism a controversial subject?

COX: No, not unless you attack atheists by name or in general, but the point is —

BARKER: The point is we do a lot of conversation and talk radio. All right, we had Madelyn Murray O'Hair on. So we got the Baptists, we got the Catholics, we got the Jews, we've got —

COX: What did she say? She simply says they are very, very wrong —

BARKER: What I am saying is that we put her on with her view of atheism, who then do we choose to represent Christianity? We can't choose the Baptists. In our part of the country the Baptists don't even belong to the Council of Churches.

COX: I would be willing to bet that if you treat that as a controversial issue, you are already so overbalanced in favor of religion — collectively, specifically, and generally — that she could be on for a week and you still wouldn't destroy that balance. Unless Madelyn Murray O'Hair gets on and attacks an individual religious figure or says that all Baptist ministers —

BARKER: She attacks God and He's a religious figure.

COX: No, you can counter that by saying it's analogous to our rule that you don't have to take account of attacks on foreign leaders. You can attack DeGaulle to your heart's content, and you don't have to offer him time. The only time you get down to this
one-to-one, Ben, or this daily thing, Eddie, is in the case of a personal attack.

FISHER: That's not so.

COX: We have never looked at the fairness doctrine in the terms "If you did it today, why don't you do something tomorrow?" We always try to take what we consider, and what the licensee represents to us to be, the relevant time period. This is not like Section 315 where, when your client puts on any candidate for any office, he has at that moment incurred a legal obligation to present every other candidate for that office in exactly the same amount of time and in the same quality of time. Furthermore, to do it reasonably promptly if requested to do so.

But if someone gets on the station — whether it's MacIntyre or your client, as licensee — and he expresses a very dim view of the United Nations and Ambassador U Thant and our current Ambassador there. . . . First of all we won't ever hear about it unless someone complains. We are not monitoring the stations. We don't have a computer that automatically counts up the presentations on each side and then suddenly says "tilt." We wait for a complaint. When a complaint comes in we write to the licensee saying, "We don't know anything about this, but here is a complaint." Usually we simply photostat the letter, unless there seems to be some reason to think that the writer might be discriminated against, in which case we block out his name. We ask for a response. Now the response can be that in his news programs the broadcaster has presented people who defend the UN to the hilt. And it may be that this was all network news programs.

We have this issue raised in the WLBT case in Jackson. We said, "Look, you fellows are accused of not having fairly presented the pro-integration point of view." Well, they said, "Well, you know all we're doing is offsetting the biased views of the network." So we went to the network and said "Are you biased, like they say you are?" You know what they came back and said! Furthermore they were prepared to demonstrate that in the network news, as fed that station, there was not precise equality, because "fairness" doesn't require it, but there was a give and take over the network between people on both sides of that issue. But when it came to the local news, the records showed it was sometimes introduced with the words, "You have just watched and witnessed a controlled northern network news program. Stay tuned now for the truth." So they started off.
dead even, and from there on if they did not present both sides they were out of balance. But we didn't say they had to be balanced in any one day, two days, seven days, or even ninety days. We said, “You name the framework and we'll look at it and see if you have reasonably presented both sides.” Now I don't ask anyone to evaluate that station — I think most good broadcasters, if they were to examine its record, would find that it was not really a service in the public interest.

It's only in the personal attack situation that you immediately incur an obligation which is precise and which runs to a particular individual or group. Somebody could come in and say, “Look, I heard somebody attacked the UN.” You don't have to put him on. You can get Professor so-and-so, or the president of the AA UN Chapter, or someone else to come on and talk. But if the fellow who attacked the UN also, by name, attacks the local AA UN chairman — and by attack I don't mean he says this man is mistaken; he says the man is a crook, he says he sold out to the Russians, or something else which is a serious reflection upon his character and reputation — only then do you incur the obligation to write a three-line letter, put a 6¢ postage stamp on it, and mail a transcript of what was said and offer him equal time at his convenience to drop by and let you tape whatever he may want to say in response. And I would tell you, I think, that nine times out of ten, he would thank you and say that he doesn't care to prolong the matter. I simply cannot see that that requirement is all that great a burden.

FISHER: Let me give you two examples, which have nothing to do with personal attacks, that I think show the “one-to-one” approach. The stations in Indianapolis opposed the Federal Trade Commission's proposal to ban cigarette advertising on radio and television. They did so by carrying news items and other editorials. The ubiquitous John Banzhaf, the poor man's Ralph Nader, complained to the Commission. The station answered. Now this is a one-shot bit. The station took the position opposing the Federal Trade Commission's position. The station answered “Well, we think we carried other comments and other remarks in favor of the Trade Commission's position,” and they cited some examples which in their opinion complied. I really don't think it's relevant whether they did or not. The Commission wrote back and said, “We find this inadequate. We're still not satisfied that you have complied with the fairness doctrine on that one issue. Please reply further.”

Another was a few years ago in Charlotte where certain broadcasters editorialized against pay TV, 3 which at that point was a hot issue and certainly wasn't favored by many broadcasters. There was a complaint and the broadcaster's reply was, "We wrote the three major people (or the four or whatever it was) in favor of pay TV and no one even bothered to answer back or wanted to reply so we just never gave any specific reply. We just relied on general news coverage." Found, inadequate responsibility under the fairness doctrine.

COX: All right. WFBM in Indianapolis — a Time-Life station. They put on two editorials, which they carried on AM-FM and television, in which — fully within their rights, as we recognized — they took sharp issue with the recommendation of the Federal Trade Commission that the FCC should do exactly what it now proposes to do, which is to eliminate the broadcast of cigarette commercials. When we asked them, as we normally do, because we did get a complaint — and I don't know that Mr. Banzhaf is any less entitled to complain than anybody else — we sent a copy of his letter to Eldon Campbell and we asked for his response. He came back and he said, "Well, look at all of the anti-smoking spots we presented." We said "Those hardly count because those are in response to the cigarette commercials. That's as to the issue 'is smoking hazardous?' That's one issue. But the issue you addressed in these editorials was the issue of whether or not the Federal Trade Commission was crazy when they suggested, by a 3 to 2 vote, that somebody ought to ban cigarette commercials." And he had done a very good job of it. He recognized his own economic bias; I think they were excellent editorials. But the only thing on the other side of this issue that they could point out was contained in the editorials themselves. They quoted Senator Magnuson as saying that the proposal of the Trade Commission was interesting and his Committee would hold hearings on it. Now that's hardly a rebuttal. They quoted H.E.W. Secretary Cohen as addressing himself, again, to the issue of the hazards of smoking. They did not point to a single statement presented in defense of the Federal Trade Commission's position, other than the mere announcement that the Trade Commission had stated this position, and then Bam!, they jump on them. Since that time Jim Nicholson, a Federal Trade Commissioner who is a native of Indianapolis, has been home and they put him on. They taped him — a little

segment — and he undertook to explain why, in his judgment, this was a sound proposal. The station has now sent this in, and I think that will dispose of it.

I also want you to be very much aware — when these people talk about it as such a great problem, and they are worried because the FCC, after all, is their licensor, but what are the sanctions if they are found to have violated the fairness doctrine? You get what I think anybody would regard as a pretty polite letter which recites the complaint, recites your response, states a conclusion, and if it is concluded that you have not fully met your obligations under fairness, the letter concludes by saying "Please let us know within twenty days what you propose to do to rectify this situation." That is precisely what happened in the Indianapolis case. They then — somewhat belatedly in this case, but that's our fault not their's, because it took us so much time to get around to ruling on the matter, which is fairly typical — they then put someone on. Now, I don't think Time-Life ever felt that its license was in danger. I think it was unfortunate that Mr. Banzhaf also petitioned to deny the renewals of the Time-Life stations in California. It was a handy letter to get hold of and it was only because of some internal friction in the Commission that it wasn't disposed of much earlier than it was.

In the WSOC case in Charlotte, as I recall the ruling, they said, "Well, you have a complaint locally. This must mean that there are some people in the Charlotte service area who think that they have a stake in pay television." And there are such people who, rightly or wrongly — I think they are unduly hopeful — think that pay television will be the answer to all the deficiencies of commercial television and that we are going to great programming simply because you will now pay for it. I guess that's the reason you get such great movies these days! In any event, the Commission concluded that there must have been some people there. If the complaint had come from the national proponents, from Zenith or Skiatron, or Telemeter, and they had been offered time and declined, that would have taken care of it. But since the complaint came from the local level, we concluded that there must be people at the local level who wanted to be heard. And that is not a man a thousand moons away. That's a man right there. You don't have to put the complainant on, but you certainly can. I don't think the Commission would challenge you if you did.

BARKER: Just one thing. In your mind, one person out of 2 million represents a point of view. Is that right?
COX: No. You have to first make the judgment. That is one answer if this fellow writes in and says, "I have heard something on this." You can write back and say — if this is your sincere conviction and you think it will stand reasonable analysis — that this is not a public controversy in your community. When Madelyn Murray O'Hair complained against all the radio and television stations in Honolulu — as a matter of fact, that is what the Commission decided — it was not shown that there was such an interest generally among the populace in hearing her position that the voluntary efforts of the station were not adequate to handle the matter.

FISHER: What if the Commission made the other judgment?

COX: Well, concededly, if there is to be any enforcement here, if there is to be any protection for what I think is a public interest in this area — other than what you gentlemen in good faith urge is the only thing we really can do, which is to rely on the broadcaster — then someone must make the judgment. The broadcaster makes a judgment now and Eddie is right, he sometimes has to make it pretty quickly, and this is one reason we don't undertake to judge Chicago, because you make the judgment, sometimes, very quickly.

No one has referred to the fact that it is our view, adopted by the D.C. Circuit at least, that when Congress amended Section 315 in 1959 to exempt bona fide news programs, news interviews, documentaries and on-the-spot coverage of news events, it added a phrase which says, in effect, "this, however, does not at all diminish the obligations of the stations to be fair in the handling of controversies of public importance." We regard that as an incorporation by Congress into the Act of the Commission's then existent fairness doctrine. And so did the Court. So we think that Congress has, in effect, ratified the fairness doctrine, saying that we are the people to make that judgment. I'm sure that we make some mistakes. Everybody makes mistakes. As a matter of fact, I have dissented in a number of these cases which indicates that I think the Commission made a mistake in a particular case. But I think it is better to have a government agency which is responsive, even if indirectly, simply because it responds to the Congress which is elected by the people — that it is better to let us have some say and occasionally make a mistake than it would be to say simply "leave everything to the licensee." It can be argued that (since hopefully the Commission initially selected qualified licensees, even though it has very little control over the subsequent transfer of their stations, and since the
public can, of course, exert some pressure by simply not watching or listening to the station) we are simply going to have to leave everything to the broadcasters. We may come to that, because Professor Jaffe may be right that there is no other way to do it. But meanwhile some of us, at least, are giving it a try. I would also point out this suggestion — —

FISHER: You mean on the fairness doctrine?

COX: No, I mean basically on the overall program proposition. I throw out this suggestion, that if we can't get local small town stations to give a little more local service, if we have no means by which we can require the individual station to live up to a standard of fairness in dealing with political candidates and issues; then I think two things could well happen. One would be a much greater stress on diversity of ownership. If we can't regulate what people do once they get the station, one way of minimizing the damage is to see that nobody owns more than one station. The other thing is that we may very well conclude that we made a fundamental error in trying to give as many communities as possible their own little station for purposes of local self-expression. If all they are getting is a reception service, and not a transmission service, then we can do that (1) by increasing the power on the clear channels and authorizing higher power for certain other preferred classes of stations, (2) by increasing the tower height of major market television stations, or (3) even by putting transmitters in airplanes, or certainly by putting them in satellites. Once we do that we will have made a judgment that it is no longer important for the government of the United States to make an effort at developing local service because it is rebuffed at every turn — conceding that there are, around the country, diversely owned, locally based broadcast outlets which can, if they either elect, or if in response to some assumed Commission directive they feel they are compelled — provide a local service.

JAFFE: Commissioner Cox, the claim that you make for diversification doesn't seem to me very convincing. I would think, as you say, that the real failure of public affairs programs and a balanced program takes place in the very small towns. I wouldn't think that diversification meant much in that situation; I wouldn't think that many of those stations are owned by the "Big" people. Is it not true that the stations you were talking about in Oklahoma and Texas were not stations that were owned by "Big" people.

COX: Well, the ones we named specifically were. They were the major television stations in Oklahoma City and Tulsa.
JAFFE: I see. Is it possible for you to tell us any more about this question? I have never been able to get an answer to why is it you were so beaten on this issue within the Commission.

COX: Well, I will try, but I must confess that I may be inaccurate because I am reflecting only bits and pieces of arguments I hear in meetings and nothing that has ever been written. My colleagues, in the majority, simply will not explain, as you so aptly raise the question, why it is that every two months they routinely renew stations, not only without looking to see what they have done, but in the face of certain information that I think ought to be a red flag. We get every two months (the last two weeks before the expiration of the license) a couple of memoranda. One is a list of stations that are being deferred for various reasons. Now these are most commonly not program reasons. They are deficiencies in the form; they are uncleared technical violations; they are complaints, which may be fairness complaints which haven't been resolved; or they may be more serious complaints that there has been unauthorized transfer of a station, or that there was a fraudulent contest, or something of that kind. By reading that list and noting it, we concur in the staff's judgment that they shouldn't be granted at that time. But at the same time, we get an item consisting of four pieces of paper. The first one says, "The following stations propose less than 5% news," and it lists them by call letters. The next one says, "The following stations propose less than 1% public affairs." Now public affairs includes all discussion programs, all editorializing, all forums, all coverage of local political meetings, anything of that sort, and political candidates as well. Less than 1%, and you can figure out how many minutes that is a week. The third page says, "The following stations propose less than 5% 'other' programming." The fourth page says "The following stations propose less than 5% public affairs and 'other'", which is a slightly different concept. Now that information comes to us because the majority still concedes that Commissioner Johnson and I are entitled to know that much before we vote on the station's renewals. On many of these lists were these radio stations which are the only stations in their communities, which are far enough from other radio-served markets that it can be presumed that they are getting no news from other stations — and they propose no news. I suspect if you were to go back into the records you would find that a significant percentage of these stations got their licenses through a waiver of our technical rules — they either received too much interference, or something, but they got a
waiver on the ground that they would be the first local station providing an outlet for local expression. They're not providing it. Not only do my colleagues not authorize any further investigation, they simply vote at that point to renew. *Now why?* They don't say. Commissioner Johnson and I have repeatedly asked them to explain.

**BARKER:** What's the magic 5%?

**COX:** It is admittedly arbitrary and I am perfectly willing to argue about it. Do you want to settle for 4%? Here are the kind of arguments I get. Commissioner Robert E. Lee, a very good friend of mine who has been on the Commission for some time, will say "Well, you know my theory is that we pick this fellow as our licensee because he is an expert in his local community." But if we picked this fellow on an uncontested application, I don't know how it ever was determined that he was expert as to his community. We decided that he was a citizen, that he had enough money to build the station and run it for a limited period of time, that to our knowledge he had never been convicted of crime and therefore not a man of bad character, and that his program proposal was based on what his attorneys had told him was an adequate survey, and, whether I would agree or not, he has come up with a proposal in terms of these percentages which may include zero news.

**FISHER:** You mean his proposal may have included zero news?

**COX:** Normally they don't the first time. They usually work down to it.

**JAFFE:** Would any of them the first time?

**COX:** I don't think so.

**BARKER:** Specialized music stations do because they have FM.

**COX:** I remember when I was chief of the Bureau, I got an application for the FM adjunct of WMT, which was a very successful AM-TV operation in Iowa. They proposed that this was going to be 97½% music and 2½% religion on Sunday. And they said, for news, that if something really important happened, they would break in and say, "Turn to the AM Station." I didn't think that was very balanced, or otherwise adequate, service and so we got some news on it. Normally they wouldn't propose it initially. Normally it is a descending curve. But Bob Lee says, "No! He is supposed to be an expert, and if he is an expert then I don't want to second
guess his judgment.” Well, I’m not going to second guess very many judgments. I don’t have time to, because the broadcaster makes a million of them a year. If he decides to delete a program, he hears from the people who liked it. If he inserts another program and it is not popular, he hears about that, so he is criticized all the time. So I say to Commissioner Lee, “Well what kind of an expert is he in this little town with no daily newspaper and no outside service which can be assumed to be covering local events. Who tells you that his best judgment is that the public interest requires no news?” And so far I haven’t gotten an answer.

FISHER: You asked him a tough question.

COX: Now, the Chairman, Chairman Hyde, believes implicitly, honestly, and fervently in the proposition that if we do much of anything in this area we are going to be censoring. He believes that if we really were effective in influencing programming we would probably make it worse instead of better, and so he is willing to confine himself to exhortation of the industry. I have heard him make speeches in which he says, “You are not doing right. Now go out, do more this, do more that.” But he also tells me, very sadly, that the results are not very good and that he doesn’t note very much amendment in their method of operation.

I think Commissioner Wadsworth believes basically that our system is a business system; that these men are making business judgments; that he is not going to interfere with those judgments; that if their service is really bad the public will turn away; that this will reach this man where it hurts him, in his pocketbook; that he will then inquire around and will somehow correct his operation and will get it back in kilter. Again, I think this doesn’t work very well. It certainly doesn’t produce very prompt results, and I don’t think it really is a responsible reaction from an agency which is charged with what we are charged with — protecting the public interest. That is, if I am correct that the statute says that every time I vote to renew a license, I am to make the affirmative findings that to do so is in the public interest because the station so operates, then it seems to me that I must consider to some degree what it is doing in the way of programming.

Commissioner Rex Lee has not been there long enough yet to have really said much on these matters. Commissioner Loevinger, our most recently departed member, was a very vigorous advocate of the proposition that we could not intervene without violating the
first amendment and that we would be pretty inept if we did. Now those are pretty much their views. Why don’t they put them on paper and stand behind them in that form? Frankly, I have never been able to find out.

FRANKINO: I would like to ask a question, Commissioner. Two of the panelists have made the statement that the attempts of the FCC in the past years in trying, either directly or indirectly, to influence program content or to influence programming in terms of regulations have broken down. My question is, can the FCC with the present statute and the present methods of operation effectively influence programming?

COX: I think if you are talking about the law and agency structure, it can. There is nothing wrong. I think, with the present statute. Professor Jaffe is dead right that it is quite vague and uninformative. It says “the public interest,” and the rest of the language really refers to common carrier standards since it was taken from the ICC Act. But the courts have held that this is adequate. They have ruled time and again that our actions cannot be held invalid. There is a rule that Congress cannot delegate its authority without setting a satisfactory legislative standard to guide the agency to which it delegates power, and this formula has been found adequate.

I think a seven man commission certainly poses problems, just like I guess a 435 man House of Representatives poses problems, but I think it also has some strengths as compared to a one man administrator, or a secretary in a Department of Communications. I think the real question is whether it is likely that different Presidents, acting at different times as vacancies occur on the Agency, will respond to the pressures brought upon them with respect to whom they should appoint in such a way as to come up with people who will have a conviction that they can and should do something about the programming problem. If there were four members of the Commission who felt that the motion that Nick Johnson and I made after we completed our Oklahoma study was sound and that we should embark on this limited escalation of our consideration of renewal cases, we could have done it. I think the mere announcement that we were doing it would have had some beneficial effects.

As I said, I really can’t comment on WHDH.4 I am inclined to disbelieve people who tell me that they are going to put on 60% local-live programming. There is a UHF station in Ventura, Cali-

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fornia, that is local-live except for 30 minutes a week. I am not sure he is going to make it, but at least he is trying.

BARKER: What does he put on?

COX: He puts on local people, by and large discussion programs, local talent, local doctors and local ministers. He doesn't have any syndicated religion; no problems with "Life Line" or anything like that.

BARKER: I hope he's got a good line of credit.

COX: Well, I don't know whether he can hold on or not, but he is trying. But if we get a proposal to take away a license from an existing station, on the ground that its programming has been mediocre to poor, from a responsible competing applicant who says to us, as I think the people filing against WHDH tried to say, "You believe us, give the authorization to us on our program basis and if three years from now we have not lived up to that, then by all means, you are entitled to take it away from us because we said you should take it away from WHDH on this basis." I think if we ever did that, then there would be a significant upgrading of programming simply because stations would feel that they were now vulnerable to that kind of attack. I really would rather have them be vulnerable on that basis rather than simply to the attack that they have an AM affiliate, or that they are owned by a newspaper — which seems to be the main thrust of the WHDH decision. I think that you could begin to make a movement.

Now, as I have often said, the Commission is never going to develop good programming. Only broadcasters and their suppliers make programs. I wouldn't know how to begin, and if I did, I would probably botch it. For the two years I was Chief of the Broadcasters Bureau I could sense a continuous reduction in the level of public affairs proposals, not just for small stations, Professor Jaffe, but by stations in the major markets. Stations which used to have at least a thirty minute discussion program per week began, first, to adopt the concept of pre-emption. They put in their renewal applications a statement: "We don't have any regularly scheduled public affairs programs, but we have a policy of pre-empting the network whenever there is a more important local program to put on." I decided, for a period of several months, to check what they were putting on. There were local parades and historical documentaries which, although they were no doubt interesting and educational, really were not discussions of the problems facing their communities, but rather were safe and
.saleable. Now they don't even do that. In other words, WFAA-TV, in Dallas, was renewed in 1962 on the representation that they were going to put on twelve half-hour documentaries a year in prime time. I don't know what they are doing now.

BARKER: They are even coming close to that.

COX: Are they? We also had a little trouble with WKY-TV, in Oklahoma City. The Commission was holding out for 20 such pre-emptions. If you can get these things in motion, then I think the response comes from the broadcaster. Now if you talk about quality, I can only hope that the broadcaster is professional enough that if he is persuaded that he's going to have to do something in the area of public affairs, he will know it is not going to hurt him commercially because, if we're even-handed, his competitor is going to have to do the same thing. Then he will have to beat his competitor in public affairs programming, just like he now tries to beat him in news or sports or in other areas where commercial support is available. I don't hold out the promise that, if we could get Newt Minow and Bill Henry back at the same time that Nick and I are still there, everything would be lovely, and that you would be getting great television programming. I think you would probably still be getting 90% of what you get today, but I think maybe the other 10% would reflect a significant change.

JAFFE: I wouldn't be unhappy, for example, if the Commission could gather itself together to provide a specific percentage of, say public affairs programs — 5% - 10%. The Commissioner all along is in the rather unhappy position of making rather enormous claims of all the things it can do and not doing anything.

COX: I think that criticism is justified.

JAFFE: If it could do a few very specific things, and it really could sell itself and sell all the commissioners on the point, it might gain a few specific objectives that would be valid. Of course, even then there are problems whether a program is really a public affairs program and you begin to have to make judgments of that sort. I would suppose that one of the most unfortunate aspects of standard television for us (I don't think there is a decent defense) is the enormous amount of advertising. I mean the breaking up of programs is really shocking. I would suppose that if there were any reform that was really significant it would be a limitation of advertising and that would involve, of course, no questions of standards (of
whether it was good or bad). That is something that would really make a great contribution. I realize the Commission tried to do a little something with that and it broke down. It couldn't apparently get together even on that.

COX: Well, the balance has shifted. That is, when we made the proposal, Newt Minow was there, and were four votes to put into our rules what I think was perhaps an inadequate standard, that is the existing standard of the NAB Code, subject to a little flexibility. We proposed to do this, and with Newt there, there were four votes for it. He then left the Commission. We had some hearings on it, because this was one issue on which the broadcasters really rallied around. The House of Representatives passed a resolution that would have barred us from adopting a rule but that was not the operative factor, because that didn't change the law since the Senate didn't even consider the matter — and I don't think would have passed it. But in the meanwhile Newt had gone and Lee Loevinger had come, and Commissioner Loevinger wanted no part of this.

JAFFE: Was not Loevinger's objection on censorship or free speech? I mean limiting the amount of advertising is certainly not censorship.

COX: I wouldn't undertake to state what Commissioner Loevinger's grounds were at that point. I don't really know. So we attempted to salvage something. We came out with a unanimous seven man decision which said, "All right, we won't deal with this by rule but we are going to have a stepped-up case-by-case consideration of commercial proposals." We have a quasi-effective procedure now whereby I think it is generally understood that if you propose more than 18 minutes an hour on radio — and that's thirty percent of the time taken away from entertainment and information for commercials — if you propose more than 18 minutes as a regular policy, you are going to get a letter. You can propose 18 minutes as a regular policy and have a fallback of 20 minutes, but you have to tell us, then, why and how often and under what circumstances you are going to go to 20 minutes.

JAFFE: 18 minutes in what?

COX: An hour. That's 30%. Now that is the current NAB Code, and you can relate that to what the President of CBS told Congress in the 30's, when he said they would never think of using more than 30 seconds in a half-hour for commercials. This is a prob-
lem. I think this may be the only thing that will ever make pay television work; that is the only way you can get an uninterrupted movie and one that hasn't been cut to fit two hours of time, or an hour of time allowing due space for the commercials that they have got to work in. We could act in the commercial area. I don't think it would conceivably violate the first amendment. We simply won't have four votes for it.

FRANKINO: We have some invited guests today. Members of the bar and also members of the industry who have come out to witness the Symposium and for a few minutes left for this session I would like to ask them if they would like to address any questions to the members of the panel.

QUESTION: I've been somewhat irritated by the discussion today because I think it is somewhat indicative of the FCC. I was wondering how all the men act together when they sit on one board. There hasn't been any mention here today of what is crucial in the communications policies. The fairness doctrine is very nice and I am sure some broadcasters worry about it. It is just not crucial for what television could be doing and what it isn't doing. I would first say to Professor Jaffe that I think that television could be used for a number of purposes that it isn't being used for. Secondly, I want to direct this to Commissioner Cox and to everyone on the panel. You talked about the program balance and regulations; and you talked about WHDH stopping divergent control. It doesn't seem to me to make any difference who owns the station or how you really regulate programs. The only way you are really going to get diversity is by offering more channels. The present Commission said this. Everybody seems to be saying it. I am talking now about the availability of CATV. I don't own CATV; I don't have any interest in it; I'm just a student looking into it all. Why does the Commission continue to live within the framework of the spectrum? Why has everybody today defined the problem within the spectrum? Why don't we open it up and say, "If you really want diversity this can do it."

COX: I think the answer to that is that CATV can provide diversity assuming — and this is not yet demonstrated — that there will be economic support for it. It can provide more diversity than the spectrum can. I am in the process of writing an article to appear in Television Age on the CATV issue and I use the example of Pittsburgh, Pa., where the Commission has been able to allocate 4 VHF channels and 3 UHF channels. Two educational stations are
on the air; the three commercial VHF's are on the air and affiliated with the networks; one UHF independent has just gone on the air; and there is a construction permit for the other one. Now if we get that last station on the air, that will be, I think, all that the Commission can do for Pittsburgh and its environs in the way of broadcast channels. Then I would be very happy to look to cable as a means of providing growth from there.

However, cable will provide diversity only for those who live in sufficiently densely populated areas, under the present technology, to support the high cost of distribution. This cuts out the rural populations. It also cuts out the poor who cannot afford $5.00 a month, and who could not afford the additional charges that I think would be required if substantial diversity on cable is ever achieved. I think that if you look to cable for something beyond what the broadcaster is presenting free over the air, and the cable operator picks up and retransmits, the cable operator is going to have to pay for it. He's either going to have to hire people to man cameras and get local people in front of them, or he's going to have to buy films; or he's going to have to become part of a cable network, which is entirely possible. But the cable network will be supportable either by an increase in overall subscription rates, by a program or per channel charge for this special service, or by commercials on the cable which again, may be all right. Now the Commission's concern is that we want, first of all, to get all these free, over-the-air channels in use if we can because they are all some of the public are ever going to get. Look at Omaha, Nebraska. It has only three operating commercial stations. There are other allocations there, but no one has yet seen the way to make them function profitably. We are hopeful that at some point in time they will be viable, since we would have to have one more commercial operation before we could have a pay operation under our recently adopted pay television rules. The problem with looking to cable there is that you don't expand on cable the way you do over the air. That is, normally, the addition of broadcast service comes a station at a time. Another station is not built — at least not after the first initial rush to get on the air — until it's pretty clear that the existing stations are viable, and it appears that another one can be supported. Now if a CATV system is to go into Pittsburgh — let's say we get this seventh station on the air and you are going to put cable in there. It's going to carry those 7 local services and maybe give slightly better signal quality. It will have the automated services that are very cheap to provide — weather and time service, a news ticker, a stock ticker. And it will have a
strictly local channel that the cable operator himself will be program-
ming, with relatively inexpensive equipment, but he will be providing
a local service that maybe the television stations will never provide.
If he goes into business with only that, I think he feels that he will
not get near enough to the 50% subscription level which he regards
as really almost necessary to run a profitable system. Therefore, the
only way he sees to get into business is to make a quantum jump in
the number of channels offered. So he wants to carry the 7 local
signals, and, in addition, he wants to bring in 4, 5, or 6 outside
signals. Well, what’s wrong with that? First of all, if he does that
he provides additional competition for the local stations; he reduces
their audiences. This reduces their attractiveness to advertisers. If
this gets to the point where it impairs their viability then we may
lose a station. And the people not on the cable, who are not getting
the six outside signals, now have one less service. In addition, he
is doing this without paying for the programming. He gets, accord-
ing to the present reading of the law, a free ride. If we would au-
thorize him a microwave, which the Commission has not yet done
in the Pittsburgh area, he could bring in the three New York inde-
pedents. But they are presenting roughly the same categories of
programming as the Pittsburgh independents will carry. An inde-
pendent station, at most, has as its top target something like 18-20% of
the audience because up to this point, at least, the other 80-82% will
watch the three network stations, whether you are in New York
City, or Los Angeles, or Seattle. If the independent broadcaster has
to share that 18% of the audience, not just with his local competitor
who pays for high-priced talent and high-priced programming, but
also with three stations from a bigger market, with bigger budgets
than he has, and where the film packages are sold before they are
sold in Pittsburgh, he is, we think, going to have a substantially di-
minished chance of surviving.

You can make an argument that since spectrum capacity is lim-
ited we should forget it and should start from scratch with cable.
But if you do that, unless there is a breakthrough in technology, you
are saying, I think, to better than 50% of the American people that
they are not to have television in order that the other 50% can
have more television than an over-the-air advertiser-supported or edu-
cational system can provide. The Commission is still committed to
the proposition, and I think Congress is too, that we want to get
maximum utility out of this valuable spectrum that we have allocated
to television. Bob Lee, who is regarded as the ultimate defender of
UHF says that when we get to 100% saturation under the all-channel
legislation, then if stations are not built on some of these allocations, he will be prepared to make at least a partial cut back if it does not appear that there is going to be commercial support or direct program pay support for these channels. If that happens, then he will give them to the land mobile people.

Of course, if at any point we are at the ceiling that we can get with the over-the-air service, then I'm quite prepared to look to cable. I'm perfectly willing to let the cable operator have enough channels — more than he can get locally — to make his proposition attractive enough to be a viable business venture. I would like to see cable technology continue to grow. I would like to see at least the potential of this promising, or frightening, prospect of a home communication center — doing all your library reading by wire, all your banking by wire, all your shopping by wire, virtually everything by wire. This will require further development, and I would like to see some of it come from the cable industry rather than all from the telephone industry which is also interested. But we are just trying to maximize free service for those who are content with that, and at the same time trying to get a balance so that there will be a place — right now this may be a geographic place and in the long range may be a place in time — where you can have a cable system developed.

FRANKINO: Would any of the other members of the panel like to comment on this?

FISHER: The broader implications of your question, I think, are totally supported by almost everyone on the panel. We are in the middle of a communications revolution and, in fact, the best expansion we are going to have in this area is by a new technology rather than by regulating TV. I wanted to throw-in one more thought in amplifying your point. You said that you were a little irritated with the panel. I have a similar irritation with the Commission. I would rather they concentrate their efforts on developing this overall technology, which requires just as much regulation as programs, and less time worrying about whether Time-Life in Indianapolis, Indiana, properly allowed someone to respond to the Federal Trade Commission.

COX: But that worried Mr. Banzhaf.

JAFFE: I think that Commissioner Cox has given a wonderful statement about the whole thing and he's pointed out something which might be underlined. That is, that all programming costs a lot of money. It's true with every type of new endeavor, particularly cultural endeavors that, given our tremendously expensive economy
the very high standard of living and very high labor costs — that all kinds of cultural activities are just fighting for their life. You just can't say it would be nice to have some more of this and some more of that. You have to be prepared to show how it can be financed.

BARKER: I would be curious to know, Commissioner, what was the latest figure, the number of UHF stations that are turning a profit at this point?

COX: Eddie, I don't really know. It's going up. I think that, outside the all UHF areas, like Fort Wayne where they've long been profitable in a number of the very largest markets, one or two of the earliest ones have started to turn a profit. You know, it was sometime before the VHF independents in New York were profitable. Now they are very profitable. I think that the number of UHF stations other than those in all-UHF areas, which are making substantial profits is still very small and there is a substantial overall net loss as far as UHF operation is concerned. However, I think one hopeful sign is that some reasonably hardheaded businessmen are still willing to take these gambles. This is an extension of technology of sorts to make this part of the spectrum work.

JAFFE: Well, I think that it's a very tough problem and I think it's still an open question whether a great number and diversity of channels is a valuable thing and is the solution. It all depends on what is the minimum cost to put on the kind of program you want carried. If, for example, it was very cheap to put on the kind of program that you are thinking about — that is, you are thinking in terms of something that can be done very, very inexpensively and I think there are some of those that would be the kind of things you term as the untapped opportunity — then of course, the more channels you add to that, the more opportunity you have to put those programs on. That, I think, is the thing that just requires investigation. But for so much of what we want — for example, many of us would like to see more substantial drama, more substantial music, more substantial ballet — there is almost no reason to suppose that we will get more if we divide up our resources among many, many channels. These things are so incredibly expensive in our society that the answer may well be that we should get along with a very few channels and concentrate on the production of those things. Now that is somewhat the question involved in public television and educational television. There is a certain amount of money that's available from the government itself, from private interests, from foundations and
from well-off people who are prepared to make contributions and also from certain publics in certain cities who will support stations. There is a certain amount of money for the kind of programming that we don't get much of today but already the different interest groups are finding that out by reason of their division, dispersion, and lack of cooperation. They can't do the kind of programming that they want to do because it's just too expensive to do it.

COX: You may be right, but I think that a government agency that's charged with maximizing the use of radio in the public interest has to try to open up as many opportunities as possible. This is why, for instance, on the cable we are even now suggesting that some of these channels be made common carrier channels, and then you literally could get to the point where if a fellow wants to be heard and he's got the money he can be heard. It wouldn't have to cost a lot because he is not buying time on a very expensive facility which has a limited amount of time. Maybe not many people will watch, but those who do will be pleased, and he will be pleased, and I don't think anybody is seriously hurt. I think we feel that we have an obligation to try to open up. You're dead right. Additional channels, without some means of assured support, is no guarantee of improved programming.

QUESTION: I have two questions I would like to direct to Commissioner Cox. First of all, in determining the amount of public service programming — I don't think I'm stretching this too much but — in a sense, isn't the Commission trying to legislate morality for the entire country? That's part one. Secondly, in the equal time situation, "Who speaks for whom?" Is it the man who is lucky enough to get on some particular broadcast to say the particular thing he believes who determines the actual response we are talking about? Can anyone come and say, "I want to respond to that speaker and subject?"

COX: As to the first point, I think maybe we are trying to legislate morality for broadcasters, if you want to say that. In other words, if we could say, as Professor Jaffe suggested we might, that every station should have a minimum of 5% public affairs programming — in our program form we have as precise a definition as we have been able to come up with for that kind of programming — we would then be, by rule, legislating an obligation that broadcasters would have to meet. This would be on the assumption that if they did it, and did a decent job of it, they would somewhat increase
their capacity to serve the community. If they really ended up discussing the major problems of the community, hopefully they could make a contribution to their resolution, because in our society I think we're committed to the proposition that that's how we want to arrive at the solutions, whether the discussions are confined to legislative halls or can be made to actually involve the public as well.

The other point is, I'm sure, frustrating to people who have heard something said on a station with which they disagree and who, when they seek time to respond, are met with the answer that "We've already presented so and so, and he disagreed with the former spokesman, and we think the matter is now taken care of." But the Commission normally leaves it there. Now, I think, Ben, you said you knew of a case where we questioned the selection of a spokesman. Is that the Charlotte case?

FISHER: Well, there was one where they couldn't find anyone so they used their own staff. I've forgotten the name of it but you found that they could do better than their own staff.

COX: Well, I don't know, because there are cases where we have indicated that maybe using their own staffs is the best they can do. But by and large we would be hard put, in your community, or in Dallas, or in Cambridge, to second guess the licensee. We would like him to say why he feels that the person he selected was an appropriate spokesman. Now, if he says, "Well, I've known him all my life, and he's a pretty well informed fellow" but the man he's turned down is the executive director of the principal organized group presenting the point of view which disagrees with that originally broadcast, I think that may be dubious. There is something in the Fairness Doctrine which says that what's called for is good faith on the part of the licensee, and that unless we have some reason to question his good faith we won't go behind his judgment. Now that means, I am sure, that results are not going to be either fair or accurate in every case, but I think that the fact that we do make a review is likely to increase the likelihood that the broadcasters will be fair.

QUESTION: I'd like to direct this question to Professor Jaffe. Consistently you've referred to ballet and drama, etc. as quality programming and yet I think the bulk of our people are blue collar workers who probably wouldn't understand the opera or ballet and would just love "The Untouchables." Where then, is the responsibility of the broadcaster? Is it to entertain and thereby derive a neces-
sary profit from his investment in the broadcast industry, or is he committed to some lofty ideal of improving culture for the mass of the people who wouldn't even understand it?

JAFFE: Well, I think that it's somewhat a function of being representative. It is thought that there's a very large public (let's say 12 million or 15 million) which would like to see something better than it presently sees. I think the idea is that there should be something for everybody including that 15 million. The 15 million shouldn't be regarded as not entitled to anything. Let's say to that 35 million who want to see "The Untouchables," "All right, we'll have more of that than everything else", but it would be nice if occasionally the 15 million could see something they'd like to see too. You see, the question is, what you mean by minorities. They're really not necessarily terribly small groups. Our population may be a little more sophisticated than you think. You say blue collar workers. But I dare say that today there are millions and millions of people who have gone to college and who have had considerable training in matters of culture who do have an appreciation of Shakespeare and who would be very pleased to see an occasional good drama. It's a growing group too. I think you underestimate by your question the number of people who might be reached by this sort of thing.

BARKER: I would like to speak to your question if I may. You mention "The Untouchables." I remember when it first came on the air; it was opposite the CBS Reports. Here was this great choice between learning about the world around you or finding out about what happened in Chicago in the early thirties.

FISHER: And not very accurately.

BARKER: But you look at the rating books (and this is something we haven't gotten into at all) and there is no comparison. Everybody was watching "The Untouchables." There was a ratio of about 8 to 1.

COX: But the 1 represented, then, roughly 12%, which ought to have that service from television.

JAFFE: You didn't have to put them on at the same time.

COX: I have a favorite story about a friend of mine who stopped, waiting for a traffic signal to change in New York City back in the days before Channel 13 was an educational station. It was then WNTA and still commercial and was carrying "Play of
the Week.” My friend overheard these two cab drivers — this was just when they had shown the second half of Eugene O’Neill’s “The Iceman Cometh.” One cab driver said, “Hey, did you see the ‘Play of the Week’ last night.” The other fellows said, “No, and I was mad. I saw the first half a week ago; but I had to do something last night.” They engaged in no critics discussion of the play, but it was obvious that O’Neill had a message for them. They probably had never attended a legitimate theatre, but here commercial television had made this possible for them.

Frank Stanton complained when they put on “Hamlet” 8 or 9 years ago that only 13 million homes watched — I don’t know how many people. Newt Minow said, “Well, you know that’s probably more people than ever saw the play in the theatre in all the years since Shakespeare wrote it. So what are you complaining about.” It’s a matter of judgment, and too often the judgment, Eddie, is made in terms of the ratings. You are right. I think that we want most people to be served most of the time. I think it would be grossly unfair to say that the bulk of the people, who probably are really quite happy with what they now get, should be forced either to watch what a more limited group would like to see or to watch nothing. On the other hand, I agree with Professor Jaffe, and I think that right now it is the other group, which is a pretty significant group, which is being denied the kind of programming it wants. I’m talking now not about Shakespeare or the ballet. I’m talking about something just as mundane, comparatively, as the weekly series that was entertainment (and I think pretty good entertainment) that however tried to tell us a little something about ourselves and the people we see around us. Something like the “Defenders” or “Mr. Novak” or “East Side, West Side” or “Slattery’s People” — these have all gone off the air. There’s not a one of them on the air, now, in which there is significant social content, unless you find this in “Dragnet,” which does present a view of the Los Angeles Police Department and some of the problems they face. But there was an audience for those programs of something like 18 million homes. But when situation comedy and action adventure were getting 30 million homes, they disappeared. This I think is part of the problem.

II. EVENING PANEL DISCUSSION

COX: Oren Harris, former Chairman of the House Commerce Committee, now a Federal Judge in his native Arkansas — and a very knowledgeable man in broadcasting — once made a speech in
which he used the simile of the tightrope. He said, "The broadcaster walks a tightrope between service of his private interest which he must serve if he is to survive, and present programming to the public and the public interest which he must serve if he is to deserve his license." He also said, "The FCC walks a tightrope between its obligation to enforce service in the public interest and the bar against censorship or interference with free speech." He took note of the fact that then, as now, broadcasters were moving for legislation or court decisions to free themselves of what they regard as undesirable restraints: they don't want to be bound by the fairness doctrine; some of them don't want to have to fill in application forms which even refer to programming; some of them go so far as to say that FCC Commissioners shouldn't even make speeches about programming. He said to them, in no uncertain terms, "You think this is in your interest; I think it is not. I think that if you ever succeeded in this, you would one day find that an important segment of your industry had gotten involved in such serious abuses that there would be a demand for such drastic changes in the basics of the American broadcast system as you have never conceived."

Now with all of its faults, I think the system is pretty good. I would rather tinker with it a little and push a broadcaster here and there. After all, we don't take his license away. If we decide he violated the fairness doctrine we write him a polite letter and ask him what he is going to do. I think maybe that's the better course.

JAFFE: I would like to make a point on the formation of public opinion. In a sense, certain examples, particularly civil rights, Vietnam, etc. illustrate precisely what I mean. I don't mean to say that what goes on TV has no effect in forming public opinion. I think, for example, that all the pictures and the actual events broadcast over a long period of time are a very important part of booming up public opinion. For example, consider the Vietnam war and the young people. The young people saw things on TV and that effected them; but anyone who knows about what went on in connection with Vietnam policy and its effect on Johnson, etc. knows that there was an enormous amount of activity outside of TV which had nothing to do with the broad effect of the war. What I am saying is that the fairness doctrine, played no role at all in the real effects of Vietnam and the effects of the civil rights movement. None whatever. The fairness doctrine would have no application to how many pictures you're going to show about Vietnam. What the Fairness Doctrine purports to deal with are the little sort of issues that are stated at
a particular time. We had an example of it this afternoon. A television, or radio broadcaster states a certain position about what the Trade Commission has decided and he doesn’t state it as completely and as fairly as the Commission thinks he should, or he doesn’t provide any adequate reply. It’s this kind of pin-pointed thing. Now I don’t think that that program at that moment, if it goes unanswered, is going to significantly form public opinion throughout the country about the cigarette situation any more than it does about Vietnam or civil rights. Is there any way, for example, of controlling how much or how little horrors of war are shown about Vietnam? If the TV people only put on how horrible the Vietnam war is, is the Commission going to write to them and say, “Well, now look here, you’re creating a terrible opinion against the war in Vietnam. You really ought to put on something showing how glorious it is. You’re really doing a terrible job.” Well, no, of course they wouldn’t; they couldn’t. There is no way of formulating it — and I come back with the proposition that the public opinion about Vietnam is not formed by pin-pointing particular issues and then writing a letter and saying you’re not doing this or you’re not doing that. That’s what I mean by saying that equal-time or the fairness doctrine is not significant, at least, as applied in the formation of public opinion.

FISHER: I’d like to discuss the relationship of Section 315 and the fairness doctrine. Candidates are regulated by Section 315 and if one candidate is given time or permitted to buy time, then the station must automatically offer the other candidate the same rights. No better . . . No less . . . The same rights. Believe it or not, the fairness doctrine is worse. The fairness doctrine requires that if I put a controversial issue on in a way that becomes a personal attack against Mr. X, I have to send the man a line, a tape of what I’ve said, and offer him time free to get on my station. Under Section 315 you can at least charge the fellow for it. However, under the fairness doctrine, if it’s a personal attack, he’s entitled to it free, if he won’t pay for it.

Concerning the presentation of news, most newscasters I find in the broadcast field are very unlike their fellow journalists in the newspaper field. They aren’t the sort that want to go out and take one side and slant news. They are born of a different group. They came up through a different medium, and generally, newsmen in the radio-television business put on the news as they best see it without attempting to slant it one way or another. It is only in the special programs, like a documentary that wants to present one side, or like
some of these commercial programs that are considered to be and intend to be, say Right Wing or extremely Left Wing — it is only in those areas that we get the fairness doctrine problems. But in the general news area, I don't think that happens.

COX: You shouldn't advise your clients that they have to send a tape, Ben. They can send a transcript which is likely to be a two minute personal attack (most personal attacks are pretty casual in these programs and likely to be pretty short). Section 315 says that if you gave time to one candidate you must give it to the other; if you sold time to one you have to sell it to the other. The fairness doctrine says if you gave to one, give to the other; if you sold to one, give to the other. The difference is that, we didn't want to leave the public's ability to be fully informed to the relative purses of the two parties. Does it concern you that the Commission found after, I think, a pretty careful study, that Chet Huntley had expressed opinions with respect to the new Meat Inspection Act without disclosing that he had a financial interest in, or was associated with, people who had a financial interest in a related field? Does it concern you that we do get charges, not relating to what is true in the news in the sense of fair commentary on the Chicago Convention, but rather concerning whether one got a true understanding of what was really going on there. I suppose even if you had been in Chicago you would have had a hard time finding out what was going on. Only a week ago we wrote a letter to the three networks in which we considered only the question of whether they had fulfilled their fairness doctrine obligations in covering the Chicago Convention. This related to the issue of their treatment of the Vietnam War plank in the platform, as well as the question of police violence and the demonstrators. We found that they had been fair — although we did say that we would leave it to the public, the networks themselves, and to the professional critics of journalism whether they really did as great a job as some of their vice presidents have been saying since then. (Many of their affiliates tell me to the contrary, Eddie. They say that it was pretty bad journalism.) But we didn't rule that way. We said that it is not our function, in the case of an honest editorializer using editorial judgment, to sit in judgment on whether the station shouldn't have presented this picture or should have presented another picture it took, or left on the floor in the editing process. But we are concerned with staging of the news; that is, if stations purport to present as news something which was not an actual event in the sense that it would not have occurred without intervention of broadcast news. And I am not talking of the possible impact of cameras; I think stations have been
careful in trying to avoid that. They turn out the lights if it appears that it's inducing action, or they go away, or they use unmarked cars and things of that kind. But we have received, from time to time — and only proceed on them if they seem to come from significant sources — allegations that, if true, I think raise a serious question about broadcasting news. Thus far, I think in every case, we have ended up ruling in favor of the news effort, and, I think, that in that way, perhaps hopefully, we are reinforcing the public's confidence in the service it gets, when, otherwise, questions might be raised and left unresolved. These are very difficult questions and we don't have adequate staff to do more in this area, even if we felt we were authorized to, and desired to do so. But, I do think that the fairness doctrine is a very fine statement of policy for responsible broadcasting. It may be that when we get down to the nitty-gritty of actual enforcement and actual disputes that you are down to fairly narrow questions of a not too significant issue — —

JAFFE: I'm really getting rather shocked by the statements, because I don't quite perceive it. Have you slid from the statements of positions that require answers to now saying that you investigate the whole presentation of news?

COX: No — —

JAFFE: Yes, you did, you said you investigated the coverage of the convention news.

COX: No, I said quite the contrary. Or, if I said that, I mis-spoke. I said we addressed ourselves to complaints, as we always do under the fairness doctrine, that the networks were not fair in their handling of two issues. One was the question of police violence in Chicago, vis-a-vis the demonstrators, and the charge that they did not make adequate opportunity available for the presentation of the position of civic officials in Chicago. The other was that they were not fair in handling the issue of Vietnam as it arose before the Democratic Convention; the specific charge was that they did not make opportunity available to those who agreed with the administration's position. We received responses from the networks, which recited what they had done on both of these issues and we didn't undertake to judge whether the result was good, bad, or indifferent reporting. We found that they had indeed provided opportunity for both sides and we declined to go any farther than that except that we indicated we were still investigating four allegations (three of them by members of the U.S. Attorney's or District Attorney's office
in Chicago, based on their own observation, and the other by a United States Senator) that they had observed what they thought was staging of news. Now, admittedly, those incidents are very difficult and, I think will, in general, tend to be resolved in favor of the news coverage. However, I think that we would be in an intolerable position — I know at least with Congress and perhaps eventually with the public — if we were to state publicly that we don’t care if someone says that what you saw last night on either the local or the network news, which appeared to be coverage of hard news, was in fact something staged for the benefit of the broadcaster. Now I am not talking about news conferences which certainly involve an element of pre-arrangement and I’m not concerned about the photographer who says, “Would you smile and shake hands again, please.” There is, of necessity, in much news coverage, an element of that kind. We are currently investigating an allegation that one of the networks broadcast a picture with the statement that here was a baby dying of starvation when in fact it was a premature baby which was not malnourished, nor were either of its parents, and starvation had nothing to do with the fact that it did indeed die shortly after the picture was taken. This is not a question, you know, of news judgment. Did an editor make a mistake in using this sequence of footage or that? It’s a question of whether somebody, in an effort to increase the impact, represented as fact, something which never occurred.

JAFFE: Well, let's put out of account the question of putting in a phony baby saying that things happen, when they have really been staged.

COX: This is very rare, fortunately.

JAFFE: Aside from the question of a phony staging of news, you seem to suggest that if you get a complaint that the news hasn’t been well covered that there is now in existence an official agency to determine whether indeed the news is being properly and adequately covered on both sides. This, I think, is a shocking proposition. You are going to get into evaluating the news and you’re ultimately going to have to end up saying it was all right when many people think it wasn’t all right. People will complain that the convention hasn’t been properly presented on any given point. How are you going to have time to sit in judgment on one case after another about whether reporters have properly balanced the news and officially come out with the conclusion that they have not violated balance when maybe they have. In other words, we begin to get an official judgment as to
whether the news has been properly presented. That isn't what I understand the fairness doctrine to be. I understood the fairness doctrine to be that if an assertion or a public issue was stated over TV, someone should present the other point of view. I didn't understand it had anything to do with the way in which the news is presented.

COX: I am still not making myself understood. Let me read from the letter we wrote to the networks on February 29. After discussion of the fairness doctrine as we understand it and as we applied it in this case, we stated:

However, the Commission has never examined news coverage as a censor might to determine whether it is fair in the sense of presenting the "truth" of an event as the Commission might see it. The question whether a news medium has been fair in covering a news event would turn on an evaluation of such matters as had occurred; what facts did the news medium have in its possession; what other facts should it reasonably have obtained; what did it actually report; etc. For example, on the issue whether the networks fairly depicted the demonstrators' provocation which led to police reaction, the Commission would be required to seek to ascertain: (1) the truth of the situation — what actually occurred, (2) what facts and film footage the networks possessed on the matter, (3) what other facts and film footage they fairly and reasonably should have obtained. And finally, in light of the foregoing, whether the reports actually presented were fair. But, however appropriate such inquiries might be for critics or students of the mass media, they are not appropriate for this Government licensing agency. It is important that the public understand that the fairness doctrine is not concerned with fairness in this sense. This is not because such actual fairness is not important, but rather because its determination by a government agency is inconsistent with our concept of a free press. The Government would then be determining what is the truth in each news situation and whether the licensee deviated too substantially from that truth. We do not sit as a review body of the truth concerning news events.

And that's the official position of the Commission.

JAFFE: That's right. I guess I didn't quite understand. What did you investigate in connection with the Chicago convention? What was the claim?

COX: I'll recite them. The complaints before us have alleged that the television coverage did not fairly present the issues on a number of grounds. We will not attempt to list all of them. For
example, it was suggested that there was a failure to give exposure to the views or statements of city government officials of Chicago with respect to alleged brutality by the police. Now that’s a point of view on the controversial question of whether there was police brutality or whether this action was a measured response to the conditions. Another example is that there was alleged bias in favor of views or opinions in opposition to the policies of the national government with respect to the war in Vietnam. There were complaints that the networks showed pictures of the demonstrations in such a way as to be unfair to the Chicago police and failed to report the violent intentions and actions of the demonstrators. Complaints were also received that the networks attempted to influence the course of the proceedings by spreading rumors especially concerning the possibility of a Kennedy draft, stirring controversy where none existed, and giving priority to the views of dissident or dissatisfied delegates. Most of these we did not investigate. What we investigated was the charge that they had not made a reasonable opportunity available for both sides on the controversy over whether this was real police brutality and over the question of balance in the presentation of the views within the Democratic party on the Vietnam issue. Those were the two things that we looked at. On those issues we found that the networks had met their obligation under the fairness doctrine and so we said we weren’t determining by some abstract divine standard, or even the standard of a seasoned critic of news reporting, whether the job they did was good, bad, or anything else. The FCC is not about to lay down rules which will tell you how to cover a national convention in 1972.

FISHER: I just wanted to ask Commissioner Cox another question which will maybe highlight this thing a little more. I think the real answer in the Chicago situation is that the potato was too hot to handle and the Commission very wisely declined. And I think that’s good policy. Let me ask the other side of the coin — from the sublime to the ridiculous. In the case of King Broadcasting Company in Seattle, the station editorialized in favor of certain local candidates. It then offered time to the opposing candidates, but in one candidate’s particular case, it gave the favored candidate a total of 120 seconds of time and it gave his opponent, as I recall, six twenty second spots to answer. Now, the candidate complained to the FCC on the ground that this violated the fairness doctrine and his rights to equal time. His argument was that, “I ought to have had twelve

ten second spots.” The Commission bought it. I’d like to know how that is an important matter of public controversy.

COX: Now you are in my backyard because Seattle is my home town and KING is one of my favorite stations and its manager, at that time, is one of my very good friends who still does not understand my position any more than you do. Let’s see if I can explain it. What KING did was to present a 20 second editorial in which they briefly said, “Seattle was at its crossroads, it had a very important election (voting for five Councilmen) and KING Broadcasting Corp. urges the people of Seattle to vote for the following candidates” and then it listed the five names that they preferred. They broadcast this on AM, FM, and television and they used what I think in commercial circles is referred to as “scatter technique.” That is, they presented some of these in the morning, some in the afternoon, some in the evening, and some late night. It was designed to get their message across to the audience listening and viewing these stations in as many time periods as possible. Now if you allocate the twenty seconds they used after introduction among the five candidates, this would be four seconds a candidate and so they multiplied the number of times they had used the spot and so arrived at the conclusion that they had devoted about 120 seconds to each candidate in their exposure. We went through two rounds on this — in the primary and in the final election. The first time the station proposed to give the concerned candidate only one exposure. They were going to give him, in a lump sum, an amount of time equal to that which the station had given to itself and its own views, in its more scientifically placed effort to reach the public. Our point was that the opposing candidate just couldn’t come on, and in an equal time, say, “Vote for me, even though KING doesn’t like me”. We felt that there should have been some effort made by the station to give not only an equal amount or a proportional amount of elapsed time but also some fairness in the probable impact on the public and in the probability of the public to hear what was said. The second time around, they upped the number of exposures for the disadvantaged candidate, but it was still substantially less than the exposure they had achieved for their message in favor of the people they supported.

FRANKINO: I’d like to open it up to our public audience for questions.

QUESTION: I don’t know if the others share my impressions but I feel that I’ve been listening to a debate with each side pre-selecting its assumptions and I find it difficult to relate the assump-
tions on which each commentator is proceeding. I would like to ask each member of the panel to tell us whether they feel that the FCC should not get into the question "in the public interest" beyond frequency allocations and technological considerations because: (a) They can't demonstrate the ability to do it (which would be a difficult debating position for the FCC to be put into because then they would never work step-by-step) or (b) because they shouldn't do it. If the answer is (b), do we need an FCC — because the phrase "in the public interest" is a value judgment?

FISHER: I think you were very nice to call those our "assumptions". If you had said our "bias," you'd have been more accurate. My answer is more in the pragmatic end. I really don't think as a pragmatic matter seven commissioners sitting in Washington, D.C., can wield any very meaningful influence on programming.

COX: I think, perhaps, we all bring a greater share of bias or prejudice or preconception to some of these matters than objective data. My feeling is that the FCC is never going to be a perfect agency at work in this field and it's going to stumble and it's going to fluctuate. As Professor Jaffe pointed out, we are either being damned for not doing anything or damned for doing too much. It's a little hard to figure out which way you're supposed to be moving at a particular time, but I think that even though there are seven of us and we sit in Washington and we don't know a lot about all of the four or five thousand communities where we have licensed stations, that cumulatively we have had enough experience whether with the life of this country, or with broadcasting itself, to form some judgments of the kind that I think Professor Jaffe would allow. That is not as to the quality of the programs, not as to which reruns and feature films they should be showing, not as to whether their news service is good or bad. But we could at least make an effort to say that if you applied to us for a license on the theory that you were going to be a local outlet in this little town, which has no other radio station, no daily newspaper, and is so far from any other radio market that it can't be presumed to get local service, then if you have zero or virtually zero news, this raises a question which we think we should explore with you ("you" being the broadcaster) and you should either increase this or you should come up with a very persuasive reason as to why you don't have more. I think the Commission could do that kind of a limited job structurally within its existing legal, statutory, and constitutional powers any time one or more Presidents have appointed four men who believe that.
BARKER: I don't think we'll ever get to a time, as long as we have public air waves, that we won't have some sort of a regulatory agency. Now there are a lot of people, especially broadcast leaders, who ask if broadcast journalism is the same as the press journalism. Now here you get into an argument. Some people say "yes" and some people say "no." If, indeed it is, then you don't need the FCC. But I can argue that there has to be in the broad sense an agency that says you have to certainly perform in a way that's in the public interest. Now here you get into the question of "What is the public interest?"

JAFFE: I think there's a fallacy implied in the question which, as a matter of fact, from time to time, I have heard. I don't know whether it is slightly involved in some of the remarks that Commissioner Cox made. It is, because programming may concern the public interest, that therefore, it is one of the things that has to be considered in connection with the public interest and that unless it is considered, there is nothing for the Commission to do. That just isn't so. There are many things for the Commission to do and they have done many, many, things. In fact, as everyone has pointed out, they have done very little about program control, but they have done all kinds of other things that concern the public interest. They have dealt with the monopoly problem; they have dealt with the control that networks have over licensees; they have dealt with the kind of people who can be owners; they have dealt with how CATV should come into the picture, whether it should come into the picture, and under what rules. There's plenty of work, I mean if you're just looking for work for them to do in regulating the industry, there is plenty to do aside from regulating programming. I, however, as I said before, think they may have a modest role even there. I think they could do something about excessive advertising. I think that providing better conditions under which the programs could take place, to wit, not having the thing interrupted by constant advertising could be a good deal more to the point than practically any other thing they can do in connection with programming.